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SUPREME COURT OF THE UNITED STATES.

No. 236.

ALFRED MARCHAND

versus

HENRY FRELLSEN.

Brief of S. P. Blanc and H. G. Morgan, for Defendant in Error.

SAM. P. BLANC,
H. G. MORGAN,
For Defendant in Error.

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The appeal taken by Fairex, with Marchand as his surety, from the judgment in executory process, rendered by the Fifth District Court, was obtained upon the bond sued on, which is as follows:

"HENRY FRELLSEN,
versus
"DANIEL FAIREX. } No. 1666.

"Know all men by these presents, that we, D. Fairex, as "principal, and A. Marchand as surety, are held and firmly bound "unto Louis Power, the Clerk of the Fifth District Court for the "parish of Orleans, his executors, administrators and assigns, in "the sum of twenty-three thousand dollars, for the payment "whereof we bind ourselves, our heirs, executors and administra- "tors, firmly by these presents, sealed with our seals and dated in "the city of New Orleans, on this 29th day of May, in the year of "our Lord one thousand eight hundred and seventy.

"Whereas, the above bounden Fairex has this day filed a pe- "tition of appeal, suspensive from a final judgment rendered "against him in the suit of H. Frellsen vs. D. Fairex, No. 1666, in "the Fifth District Court for the parish of Orleans, on the 18th "day of May, 1870.

"Now, the condition of the above obligation is such that the "above bounden D. Fairex shall prosecute this appeal, and shall "satisfy whatever judgment may be rendered against him, or that "the same shall be satisfied by the proceeds of the sale of his "estate, real or personal, otherwise, if he be cast in the appeal, "that the said Marchand, surety, shall be liable in his place.

(Signed) "D. FAIREX, [L. S.]
"A. MARCHAND, [L. S.]

"Signed, sealed and delivered in the presence of L. L. Levy."

This bond was given under Arts. 575 and 579 of the Louisiana Code of Practice, and not under article 577, as counsel for plaintiff in error would have us believe. This has been pointedly determined by the Lousiana Supreme Court. State *ex rel.* Bankhead vs. Judge, 22 La. An. 36; Cottman vs. Ratliff, 20 La. An. 179; 26 La. An. ———; Alley *et al.* vs. Hawthorn, 1 La. An. 132.

"A judgment *in rem* may be for a sum as specific as a "personal judgment. To suspend the execution of a judgment "for a specific amount, whether it be an order of seizure and sale, "or an ordinary judgment, the appeal bond *must conform* to Art. "575." 22 La. An. 36.

This case was decided on a dispute as to the amount of the bond to suspend *executory process* on a mortgage. An order of seizure and sale is regarded as a final judgment. 2 La. An. 145; 6 Rob. 209; 15 Peters,167; 2 La. An. 776.

Articles 575 and 579, under which the bond was given, reads:

Art. 575—"If the appeal has been taken within ten days, not in- "cluding Sundays, after the judgment has been notified to the par- "ty cast in suit, when such notice is required by law to be given, it "shall stay execution and all further proceedings, until definitive "judgment be rendered on the appeal; provided, the appellant "gives his obligation, with good and solvent security, residing "within the jurisdiction of the court, in favor of the clerk of the "court rendering the judgment, for a sum exceeding, by one half, "the amount for which judgment was given, if the same be

"for a specific sum, as security for the payment of the amount "of such judgment, in case the same is affirmed by the court to "which the appeal is taken."

Frellsen's proceeding is purely an action at law, on a judicial bond, given under the peculiar procedure of Louisiana, and his rights are not to be tested by any supposed analogy between the obligation arising under a *supersedeas* bond, in a foreclosure in chancery, and those fixed by express language of the Louisiana law in regard to the bonds given for *suspensive appeals.* The careful effort made in the adverse brief to show that the bond sued upon ought to be construed with reference to Art. 577 of the Code of Practice, is a virtual admission that if it was required and given under Article 575, the plaintiff in error had a hopeless case. That to operate a stay of the judgment in executory process, the appeal must be taken and the bond given, under Article 575, is not an open question, as we have already shown.

The purpose of executory process is to afford an *expeditious* method, based on an act importing a confessed judgment, for the collection of *money;* it has nothing in common with an action for the *delivery* of property, *the promissory and petitory actions* of the civil law. A suspensive appeal from, and a judgment given, to put into effect this *expeditious* mode of collecting *money*, in all fairness, ought not to be granted on easier terms to the debtor than would be allowed him for an appeal in a proceeding neither founded on a confession of debt, nor presenting peculiar claims for escaping the "*law's delays.*" All bonds given for a suspensive appeal from a judgment, or order for *money*, are *necessarily* given under Articles 575 and 579 of the Code of Practice, and it is determined that this bond is given as "*additional security*" to the appellee; it is the price or thing given to arrest the judgment in favor of the appellee.

Alley vs. Hawthorne, 1 La. An. 123.

Diamond vs. Petit, 3 An. 39.

The application of those articles and decisions to the circumstances of the case at bar, has been done so often by the Supreme Court of Louisiana, that the jurisprudence of the State in this particular cannot be mistaken. The appellant, to stay a judgment in executory process, must give his bond for one-half over and above the amount of that judgment, as *additional* security, conditioned to pay whatever may not be recovered from the estate liable to be taken under the process.

In Whan vs. Irwin, 27 An. 706, decided in 1875, the Court say:

"It is contended that the proceeding against the surety was "premature, as only the property mortgaged had been sold under "the writ, and no execution has been issued against the judg-"ment debtor and returned *nulla bona*. If this proposition be "correct, to require a bond for an appeal from an order of seizure "and sale is an idle form.

"Article 575 of the Code of Practice and Section 37 of the "Revised Statutes of 1871, justify the mode of proceeding in this "case. The only execution which it was possible for the judg-"ment creditor to cause to be issued was issued, and returned "not satisfied.

"The requirements of the law were substantially complied "with. The surety knew that, under the executory process, no "other property could be sold except that which was included in "the mortgage, and when he stopped that by signing the appeal "bond, he obligated himself to pay the amount of the judgment "for which the writ had issued, if affirmed on appeal.

"By reason of the nature of the judgment, no execution "could be taken out—after the return of the order of seizure "and sale—which could reach the property of the debtor, and "therefore the plaintiff had the right to proceed immediately "against the surety on the appeal bond.

"A different interpretation of the law would make of judicial "suretyship a mere farce, the commencement, rather than the "end, of litigation."

This is affirmed in Landry vs. Victor, 30 An. (decided in 1878). In addition to these, and shortly after the case of Georgiana Whan was decided, the case of Edward Thompson vs. R. E. Grow, presenting the same issues, were disposed of in the same manner against the surety. The case of Thompson vs. Grow was decided in 1876, and is not reported, the rule being taken as fixed by the Whan case. See list of unreported cases in 28 La. Annual Rep., and Louque's Digest, p. 39, No. 4.

Again, in White vs. Myra Clark Gaines and others, 28 La. An. Rep. 533, the Supreme Court of Louisiana referred to the Whan case with approval. The intimation of the opposing brief that the Whan case did not contain the law of Louisiana, cannot be easily accepted, in view of two such decisions as those in the cases of Whan vs. Irwin, and Landry vs. Victor, the first rendered by one, and the other by an entirely distinct set of Judges—the latter fully endorsing the decision of the first bench—and these decisions have again been accepted as the law, and applied by the same high tribunal in the other cases cited above.

II.

It is urged the property sold for $40,000.00, netting $35,986.90, an amount sufficient to pay the *two* judgments in the two suits in the Fifth and Seventh District Courts, Nos. 1438 and 1666, and consequently the surety was discharged. These judgments were for only a *part* of the outstanding unpaid notes of Fairex, having equal rank and secured by the same mortgage, and therefore, the proceeds could not be imputed to any particular note or notes, but as the representating the property sold, was proportionately due to each note, and to be appropriated to all alike. Had every one of the many notes been in court in various suits and different sureties had been given in each case, Marchand could not have claimed to have the proceeds of the property imputed exclusively to the notes in the suits in which *he* had signed bonds. The same claim might, with the same force, have been made by any of the other sureties or by all, which would only necessitate what has been declared by the law, viz: that the proceeds of

property subject to mortgages or claims, equal in rank to or concurrent with that under which the sale was provoked, must be distributed *pro rata* to all.

C. P. 686; 11 L. 72; 1 R. 224, 295; 2 L. 455; 2 R. 241; 6 R. 461; 10 R. 49; 11 An. 181; 14 An. 158; 3 An. 144; Merchants' Mutual Insurance Company vs. Sam'l Jamison, 25 An. 363; Howard vs. Schmidt, 29 An. 129; M. Ovile Begnaud vs. Roy, 21 An. 624; Peyroux vs. Levasseur, 21 An. 529; Pepper vs. Dunlap, 16 La. 163; 5 R. 47.

In Chaffraix & Agar vs. Packard et als, 26 An. 175; where the plaintiff, it appears, brought two suits by executory process, it was decided: that a sale of the mortgaged property under circumstances, showing the existence of other outstanding notes having concurrent rights, must be made on terms to meet the entire hypothecation, and when the sum realized was not sufficient to pay the entire mortgage, the proceeds must be ratably divided between the several notes, and that the sale cannot affect the rights attached or belonging to said notes to a proportionate division.

See, also, on this point of the apportionment of proceeds of mortgaged property among concurrent mortgage notes, Rice vs. Schmidt, 11 La. 70; Pepper vs. Dunlap, 16 La. 170; 2 R. 319.

This law has been strictly observed, every note has been credited with its *pro rata*. Each note, is, as it were, secured by itself on the common property, by a mortgage common to all, under which all are entitled to be paid alike, and upon which all bear the same rights, equal privileges and concurrent rank. It matters not whether the notes be each owned by a different person or by one; the law makes no distinction in such a case, how can Marchand? If the holder of two notes, drawn by one person, due at different dates, secured by mortgage, loses any of the rights which attached to one of these, by suit on the other, it would be useless to make the notes mature at different dates; for the holder would be forced, either to resign the rights attached to the note last

due, by suing on the other, or he must wait until both are matured, and institute proceedings on each at one time. The destruction of sales on credit, in payments to be made once a year, for several years, would be the result of so mischievious a doctrine; to say naught of the many other transactions depending on agreements to pay by installments, evidenced by notes, which are of daily occurrence, and which enter so largely into trade and commercial contracts. That the holder of several notes must either wait until all are matured before pursuing his rights on any one, or incur the penalty of yielding the privileges attached equally to all, is a doctrine which it cannot be supposed would be urged, except in a spirit of desperation.

III.

The argument for plaintiff in error labors to confuse the proceedings on the notes in the Fifth District Court with those in the Seventh District Court. There was in reality nothing in common between the notes, except that any of several holders would have had peculiar rights to enforce payment against the *same* property. The notes in the one case were *distinct* from the notes in the other. The drawer was liable on all, and the payment of one would certainly not have discharged him from his obligation on any other. So the partial payment of one or all, by a resort to any property of the debtor, peculiarly liable for the notes, could not and did not discharge him from the balance. It was precisely to secure the payment of such balance or remainder, that the law of Louisiana requires a bond for a suspensive appeal, a bond given to *increase* the security already existing in the estate or credit of the debtor, a bond conditioned that the *whole* "shall be satisfied by "the proceeds of the sale of his estate, real or personal, if he be "cast in the appeal; otherwise, that the said Marchand, surety, "shall be liable in his place." (Record, p. 3). That the proceedings in the Seventh was distinct from those in the Fifth District Court, and the notes themselves, *different* and distinct obligations, has been found as facts by the lower Court. (Record p. 18—bottom of page).

Suppose this transfer to Frellsen had taken place a week before the sale, would this have affected his rights against Marchand in the suit 1666 any more than had he received the transfer one day before? Or, would those rights have been any the less if the transfer had taken place *two* weeks before the sale, or a month before, or at any time *after* the third person had brought the suit, or, indeed, if the notes sued on in 1438, had been purchased by Mr. Frellsen *before* the suit was instituted?

VII.

Every necessary step towards recovering on the judgment of Fifth District Court which Marchand, as surety, arrested, has been taken; the property was exhausted, and what he is called on to do is, to pay what the property has not sufficed to furnish. Besides, Fairex was dead, and insolvent at the time the rule was filed. (Record, p. 18, Finding of Facts). This alone authorized immediate proceedings against the surety, Marchand. Alley vs. Hawthorne, 1 La. An. 126.

We respectfully submit it is absurd to urge that Marchand is released because he cannot be subrogated to Frellsen's previously existing mortgage, in the same brief in which it is urged that he, Frellsen, was bound to proceed to enforce that mortgage, and use every necessary step to recover on it *before* he could resort *to* the security.

Frellsen was bound to exhaust the property liable for his notes before proceeding to the surety, for the bond was conditioned to resort first to the principal's estate liable to be taken in the proceeding.

If Frellsen could have proceeded against Marchand without first exhausting the hypothecated property, his claim would be for as *much more* than he now asks, as the sale of that property has paid him. The surety has, therefore, received the benefit of that property, and cannot complain that he may not receive it a second time.

Respectfully submitted,

SAM. P. BLANC,
H. G. MORGAN,
For Defendant in Error.